

Securities Regulation Daily Wrap Up, SEC NEWS AND SPEECHES— D.D.C.: FOIA disclosure would not interfere with fairness of pending litigation, (Nov. 21, 2013)

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By Rodney F. Tonkovic, J.D.

The SEC's denial of a request for confidential treatment was reasonable and did not violate the Administrative Procedure Act (APA), a district court has found. Chiquita Brands International, Inc. (Chiquita) sought to prevent the Commission from releasing certain documents in response to a FOIA request by the National Security Archive (Archive). The court found that the Commission rationally determined that disclosure of the documents at issue would not interfere with the fairness of the underlying litigation (*Chiquita Brands International, Inc. v. SEC*, November 19, 2013, Leon, R.).

Background. In November 2008, the Archive submitted two FOIA requests to the SEC for documents produced by Chiquita during the course of two investigations. Chiquita requested that the documents not be disclosed under SEC regulations providing for confidential treatment "for reasons of personal privacy or business confidentiality, or for any other reason permitted by federal law." The SEC, however, informed Chiquita that the documents were responsive to the FOIA requests.

FOIA requests. Upon receiving a request for confidential treatment, the SEC Office of FOIA Services (Office) issues a preliminary decision. The requestor may provide supplemental arguments if it disagrees and the Office will then issue a final decision. If the requestor still disagrees, then it may appeal to the SEC's Office of General Counsel (OGC). Finally, the requestor may seek judicial review of the OGC's decision under the APA.

Chiquita asserted that certain documents related to payments made to Colombian terrorist organizations should be withheld under FOIA Exemption 7(B). This exemption protects information compiled for law enforcement purposes if production would affect the "right to a fair trial or an impartial adjudication." Chiquita argued specifically that production of the payment documents would interfere with the fairness of litigation taking place in the U.S. District Court for the Southern District of Florida. Chiquita also sought the withholding or redaction of certain other documents (the overlapping documents) to the extent these documents were withheld or redacted by the Department of Justice (DOJ).

The Office initially denied Chiquita's request in December 2012. After Chiquita submitted its supplemental arguments, a final decision affirming the preliminary decision was issued. Chiquita appealed to the OGC, arguing that public disclosure of the documents would interfere with the Florida litigation and compromise a criminal proceeding pending in Colombia. The OGC denied the appeal, and Chiquita brought this action, alleging that the SEC violated the APA.

Exemption 7(B). Chiquita argued that the SEC's decision to disclose the documents was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." A similar argument was made regarding the Commission's independent assessment of the overlapping documents. The court concluded that there was ample evidence on the record to support the Commission's decisions.

The D.C. Circuit requires a two-part showing to invoke FOIA Exemption 7(B): 1) that the trial is pending or imminent; and 2) that it is more probable than not that disclosure would seriously interfere with the fairness of the proceedings. The OGC found that the Florida litigation satisfied the first prong of the test, but not the second. According to the OGC, Chiquita failed to show how disclosure of the payment documents would interfere with the fairness of the Florida litigation.

The court found no doubt that the SEC's determination that disclosure would not interfere with the Florida litigation was rational. Chiquita, the court explained, failed to demonstrate that disclosure would confer an unfair advantage upon the plaintiffs because it conceded that it would produce the documents if the discovery stay is lifted. Chiquita also speculated that publicity about the disclosure could affect a future jury, but the court noted that the test requires that disclosure "would" (not "could") compromise the fairness of the litigation. Chiquita also failed to show how safeguards such as *voir dire* would not be sufficient to ensure fairness.

The Commission also rejected Chiquita's argument that judicial officials in Colombia would be unable to distinguish between improper evidence and negative publicity resulting from the disclosure. The court found that the Commission rationally determined that there was no likelihood of harm sufficient to invoke the exemption. The court remarked that judicial officials are trained to distinguish between proper evidence and adverse publicity.

Regarding the overlapping documents, the court found that the SEC acted reasonably in processing the documents independently rather than simply applying the same exemptions and redactions as the DOJ. Chiquita was unable to cite any authority requiring the SEC to adhere to the DOJ's determinations and made no effort to explain why specific exemptions should apply. It was thus reasonable for the OGC to find no basis for withholding or redacting these documents, the court concluded.

The case is No. 13-435.

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Company: Chiquita Brands International, Inc.

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